

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 16, 2005 Session

KARISSA RENEE JOSEPHSON KELLEY v. JOHN MICHAEL KELLEY

**A Direct Appeal from the Circuit Court for Davidson County
No. 01D-2291 The Honorable Muriel Robinson, Judge**

No. M2004-01202-COA-R3-CV - Filed September 15, 2005

This is an appeal from a final decree of divorce as it concerns the award of child support. Husband appeals and asserts that the trial court erred in the method used to calculate his child support obligation. The trial court arrived at the child support by averaging three years of Husband's income as opposed to basing it upon his actual income. Since the trial court made no written finding that Husband was voluntarily underemployed before deviating from the Tennessee Child Support Guidelines, we reverse and remand.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and
Remanded**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J. and WILLIAM H. INMAN, J.SR., joined.

Alfred H. Knight and Tyree B. Harris IV of Nashville for Appellant, John Michael Kelley

Thomas F. Bloom of Nashville for Appellee, Karissa Renee Josephson Kelley

OPINION

Karissa Renee Josephson Kelley ("Wife," "Plaintiff," or "Appellee") and John Michael Kelley ("Husband," "Defendant," or "Appellant") were married on April 22, 1996. One child, Devin McKenzie Kelley (d/o/b August 28, 1996) was born to this marriage. On September 14, 2001, Ms. Kelley filed a "Complaint for Divorce" against Mr. Kelley. At the time of the hearing in this matter, Mr. Kelley was thirty-two (32) years old and in good health. He graduated from Vanderbilt in 1993 with a Bachelor's Degree in Guitar Performance and a double major in economics and finance. In 1996, a few months after the parties married, Mr. Kelley took a job in the guitar industry. He was hired by Washburn International in Nashville, Tennessee as a District Sales Manager. At that time, he earned twenty-five thousand dollars (\$25,000.00) a year plus commission. By 1998, Mr. Kelley's

gross income had risen to eighty-nine thousand, three hundred and twenty-nine dollars (\$89,329.00).¹ In August 1999, Mr. Kelley received a promotion to Product Manager for the Randall Amplifier Division of Washburn. His promotion required him to move to Chicago, which he did. In 1999, he earned ninety-eight thousand, six hundred and forty-seven dollars (\$98,647.00). In 2000, he earned ninety-four thousand, seventy-eight dollars (\$94,078.00). Mr. Kelley was eventually promoted to National Sales Manager for Washburn.

Sometime around March of 2001, Ms. Kelley moved with Devin back to Nashville. Mr. Kelley remained in Chicago until August of 2001. One month prior to Ms. Kelley's filing for divorce, Mr. Kelley moved back to Nashville. Mr. Kelley continued to work for Washburn until November 2001. He earned one hundred, twelve thousand, four hundred and eighty-nine dollars (\$112,489.00) in 2001.

In November 2001, Mr. Kelley quit his job with Washburn and accepted a job with Crafters of Tennessee. At Crafters, he was promised a base salary of eighty-five thousand dollars (\$85,000.00) plus bonus. Mr. Kelley worked for Crafters of Tennessee for ten months then quit to start a joint venture called Music City Sales. Within two months, Mr. Kelley received an offer of employment with Fender Guitar, the largest musical instrument manufacturer in the country, and accepted the position of district manager. In his first year with Fender, Mr. Kelley testified that he had the potential to earn ninety-two thousand, five hundred dollars (\$92,500.00) if his sales budget exceeded one hundred twenty percent (120%). Concerning whether his sales budget was exceeding one hundred twenty percent, Mr. Kelley testified as follows:

Q. Now, with Fender, you've seen the exhibit that you make \$52,500 as your base pay?

A. Correct.

Q. Now, there's potential to make more than that with commission, is there not?

A. Yes, sir.

Q. Now, during the year of 2003, for this year, have you exceeded the \$1,500 commission each month?

A. No, I've been at...operating at 100 percent of my sales budget. So, I've been earning the \$1,500 a month.

¹ Mr. Kelley's income for the years 1998 through 2001 is taken from trial Exhibit 2 and from the testimony adduced at the hearing.

Q. And that \$1,500 would put you at \$5,584.46 a month gross, is that correct?

A. Correct, sir.

Although Mr. Kelley testified that there was “absolutely” potential for advancement at Fender, his testimony indicates a projected income of approximately sixty-seven thousand dollars (\$67,000.00).

On November 6, 2003, the trial court entered a “Divorce Decree” and a “Permanent Parenting Plan”. The trial court ordered Mr. Kelley to pay \$1,170.00 per month in child support. In setting Mr. Kelley’s child support obligation, the trial court made the following relevant findings from the bench:

Okay. Now, the proof is apparent here that Mr. Kelley...This is a marriage of short duration. It’s seven years. However, Mr. Kelley has been the major bread winner of this family. I have to take into consideration that his income he has the ability to earn has ranged from \$112,000 down to \$50,000 per year. So, I have to average the top three years of income.

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The child support based on his income averaging of three years is \$1,170.

Mr. Kelley appeals and raises three issues for review as stated in his brief:

I. Does the trial court have the authority to base a child support award on an average of the father’s three past years of highest earnings, rather than his present income, without finding that he is “under-employed”.

II. Can a father be considered “under-employed” if he moves from Chicago to Nashville in order to be with his daughter and incurs a demotion in his employment position as a result?

III. If the trial court bases a child support award upon past higher earnings under such circumstances does it violate the father’s due process rights to travel and to maintain the integrity of his family relationships?

T.C.A. § 36-5-101(e)(1)(A) (Supp.2004) states that:

In making its determination concerning the amount of support of any minor child or children of the parties, the court *shall* apply as a rebuttable presumption the child support guidelines as provided in this subsection. *If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding* that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child(ren) or the equity between the parties....

Id. (emphasis added).

As noted above, in the instant case, the trial court states that Mr. Kelley's child support obligation is "based on his income averaging of three years". Although there is a presumption of correctness in calculations of child support consistent with the Tennessee Child Support Guidelines ("TCSG"), T.C.A. § 36-5-101(e)(1)(A), Tenn. Comp. R. & Regs. R. 1240-2-4 .03(3)(d) states that "[i]f an obligor is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience." Although the trial court may deviate from the guidelines, the decision to do so is discretionary. As such, the standard of review in child support matters differs from the standard Tenn. R. App. P. Rule 13(d) "presumption of correctness." This Court has discussed this heightened standard of review as follows:

Setting child support is a discretionary matter. *See State ex rel. Coleman v. Clay*, 805 S.W.2d at 755. Accordingly, we review child support decisions using the deferential "abuse of discretion" standard of review. This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *See BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn.Ct.App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). While we will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.

State ex rel. Vaughn v. Kaatrude, 21 S.W.3d 244, 248 (Tenn. Ct. App.2000).

From the July 2003 TCSG, it appears that the trial court based Mr. Kelley's child support obligation upon a gross monthly income of approximately \$7,750.00 (i.e. \$7,750 gross = \$5,580.89 net x 21% for one child = \$1,172.00 child support per month). As noted above, the trial court specifically states that Mr. Kelley's support obligation is "based on his income averaging of three

years.” Although Mr. Kelley asserts that the trial court averaged his top three years of income (i.e. 2001 = \$112,489, 2000 = \$94,078, 1999 = \$98,647), averaging these amounts would result in a gross monthly income of approximately \$8,478.00, which, under the TCSG, would yield a support obligation of approximately \$1,276.00. Since the trial court ordered Mr. Kelley to pay \$1,170.00 per month in child support, it is not clear to this Court exactly which three years the trial court averaged. At any rate, in arriving at Mr. Kelley’s income by averaging three years of income, it appears to this Court that the trial court proceeded under Tenn. Comp. R. & Regs. R. 1240-2-4 .03(3)(d) as if Mr. Kelley were voluntarily underemployed.

As set out above, in T.C.A. § 36-5-101(e)(1)(A), any deviation from the child support guidelines must be accompanied by a “*written finding* that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child(ren) or the equity between the parties....” In the instant case, the trial court has made no such finding (either written or otherwise). In fact, from our review of the record, there is no evidence on which the trial court could have found that Mr. Kelley was voluntarily underemployed. The trial court itself states that the income that Mr. Kelley “has the ability to earn has ranged from \$112,000 down to \$50,000 per year.” At the time of the hearing, Mr. Kelley’s undisputed testimony was that he would likely earn somewhere in the neighborhood of seventy thousand dollars (\$70,000.00) that year. Seventy thousand dollars is well within Mr. Kelley’s range of earning potential as set out by the trial court. Furthermore, although Mr. Kelley has changed jobs and/or companies several times, this fact, in and of itself, does not evince a willful underemployment. The testimony is that Mr. Kelley changed positions for legitimate purposes, including advancement and to be near his daughter. In addition, Mr. Kelley forfeited his joint venture with Music City Sales in order to take a job with Fender, the largest manufacturer of musical instruments in the country—a decision that presumably will provide more job security and earning potential, at least for the foreseeable future.

At any rate, since the trial court made no finding that Mr. Kelley was voluntarily underemployed, we find that the trial erred in deviating from the TCSG. In the absence of a written finding that Mr. Kelley was willfully underemployed, or that a deviation from the TCSG was otherwise warranted, under T.C.A. § 36-5-101(e)(1)(A), the trial court is obligated to base the child support award upon Mr. Kelley’s actual income at the time of the hearing. Mr. Kelley’s remaining issues are rendered moot by our findings herein.

For the foregoing reasons, we reverse the trial court’s Order, setting Mr. Kelley’s child support obligation at \$1,170.00 per month. We remand for such further proceedings as may be necessary consistent with this Opinion. Pending remand, the current child support payment shall be in effect. Ms. Kelley’s request to find this a frivolous appeal is denied. Costs of this appeal are assessed one-half to Appellant, John M. Kelley, and his surety, and one-half to Appellee, Karissa Kelley.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.